Matter of Herta, (Supreme Court, Westchester County, 5/17/94). This Article 78 proceeding was brought by a private individual seeking an order vacating the Mount Kisco Village Planning Board's issuance of a negative environmental determination made in connection with Cellular One's application for a special use permit and for site plan approval. Cellular One's application related to its proposed replacement of an 85' wooden pole with an 85' steel monopole to which antennas would be affixed. During the SEQRA hearing, the Planning Board asked Cellular One to actually measure levels of energy at 17 points around the existing wooden antenna tower. Cellular One complied with the request to the extent that levels were measured at 10 accessible points surrounding the pole. The tests confirmed that Cellular One's site would have no negative health impact. The Planning Board voted 4-2 in favor of issuing a negative declaration. In the Article 78 decision, the Court affirmed that the replacement of a wooden pole by a steel monopole would have a minimal impact on the surrounding area and would not pose a health hazard to nearby residents. It further held that the site would not impair the character of the neighborhood or the quality of its aesthetic resources.

Cellular Telephone Company v. Sherlock, (Supreme Court, Westchester County, Index Number 93-741, 6/25/93). In this Article 78 proceeding, Cellular One sought an order vacating the Planning Board of the Town of Somers' denial of Cellular One's application for an amendment to an approved site plan and for a steep slope disturbance permit. Cellular One sought to replace a 45' lattice tower with a 75' monopole to be erected in a public utility lot also containing a water tank, a 75' lattice tower for cable television antennas, and a utility building. The site is on the grounds of Heritage Hills of Westchester. The Court noted that the evidence at the public hearing established, inter alia, that the facility would pose no potential hazards to the health of the community inasmuch as the maximum level of radio frequency energy would meet all applicable health limits and that the facility would provide a large safety margin in terms of radiation guidelines for radio frequency radiation. The Court also noted that there was evidence that the monopole would not have significant aesthetic impact due to the layout, existing terrain, surrounding buffer trees, and the material and color of the structure. Finally, the decision is noteworthy in that the Court held that the Planning Board's decision denying Cellular One's application based on Cellular One's refusal to provide the Planning Board with a full copy of the lease in question was arbitrary and capricious inasmuch as there was nothing in the record to show that submission of the lease was pertinent or necessary to the review of the issues before the Board.

Cellular Telephone Company v. Herbst, (Supreme Court, Putnam County, Index Number 96-92, 07/06/92). The Town of Patterson Zoning Board of Appeals denied Cellular One's application for an area variance. Cellular One appealed to the Supreme Court for the County of Putnam pursuant to CPLR Article 78. The proposed cell site in this case consists of a 125' monopole with antennas and a modular building. An area variance was necessary because the maximum height allowable in the District in question was 30'. At the time the Zoning Board of Appeals denied the area variance, it granted a use variance and acknowledged that Cellular One is a public utility. Concurrent with the Zoning Board of Appeals hearing, the Planning Board conducted an environmental review of the application and issued a negative declaration pursuant to SEQRA, finding that the site would not significantly impair the aesthetic resources of the community and that the visual effect of the tower would be minimal. The Supreme Court in its decision noted that the record substantiated the need for a 125' tower and that a tower of lesser height would not suffice. Accordingly, the Court granted Cellular One's Petition and directed the Zoning Board to issue the area variance sought.

Cellular Telephone Company v. Kern, (Supreme Court, Suffolk County, Index Number 91-13149, 03/20/92). In this case, Cellular One brought an Article 78 proceeding seeking an order vacating the Town of Smithtown Zoning Board of Appeals' denial of Cellular One's request for numerous area variances based on a finding by the Town that Cellular One's use was an accessory use rather than a public utility use. The proposed cell site would require the erection of a 174' steel monopole adjacent to a public skating rink. The Court held that Cellular One is a public utility and, accordingly, its use is a permitted use in the district and that no variances are required.

Matter of Cablevision Systems Corp., (Supreme Court, Nassau County, 03/24/94). Cablevision brought an Article 78 proceeding seeking an order annulling and reversing a determination by the Town of Oyster Bay Zoning Board of Appeals which held than an antenna tower is not a permitted accessory use in an industrial district and directing the Board to grant Cablevision a special use permit to construct a 246' lattice tower. In the Court's lengthy decision granting Cablevision's application, the Court held that the Board's finding that the tower would transmit electromagnetic frequencies which may be hazardous to the public health and that that in turn would have the effect of depreciating the value of nearby properties is contrary to the facts submitted at the hearing. The Court accepted the uncontroverted testimony of Cablevision's expert witness who unequivocally stated that no health hazard would result from Cablevision's tower. In particular, the Court rejected the Planning Board's finding "that the threat of a tower antenna transmitting EMFs has caused hysteria in the community." In so

doing, the Court stated: "By disseminating the false impression that the tower antenna will transmit high levels of EMFs, the respondents have acted irresponsibly and may themselves be the cause of any hysteria in the community." The Court also held "It is well settled that aesthetic evidence may not be the basis of denial of a special permit. While there were neighborhood objections raised at the hearing, the Court of Appeals has held that generalized community objections to plans to construct the tower antenna will not serve as a basis for denying site plan approval."

Orange & Rockland Utilities, Inc. v. Town of Stony Point, (Supreme Court, Rockland County, New York Law Journal, July 12, 1993, Page 25). In this case, Orange & Rockland Utilities, Inc. brought an Article 78 proceeding seeking an order annulling the Town of Stony Point Town Board's denial of a special use permit to install a 2,300 square foot substation on a 5 acre site. The Court's decision granting the utility's Article 78 Petition is noteworthy in several respects. The Court concluded that the Board denied petitioner's application not because it failed to comply with special permit standards, but rather because of general opposition of neighbors and special interest groups. It cited Matter of North Shore Steakhouse v. Board of Appeals of the Incorporated Village of Thomaston, 30 N.Y.2d 238, 331 N.Y.S.2d 645 (1972) for the proposition that:

> "the burden of proof of an application for a special exception permit is much lighter than that required for a hardship variance...it does not require that the applicant show that it has been denied any reasonable uses of the property but only that the use contemplated by the ordinance subject only to 'conditions' attached to its use to minimize its impact on the surrounding area."

With respect to the EMF issue, the Court stated:

> "By no means is the Court suggesting the Town or its residents are barred from ever questioning or challenging the safety of any of the utility's equipment including substations and their appurtenances. The permit application, however, is not the appropriate vehicle. A legislative determination has already been made by the Town that utility substations are permitted uses subject only to the imposition of reasonable conditions." [Emphasis added.]

The Court also held:

> "Nonetheless, and in the absence of any expert opinion to the contrary, the Board allowed and considered

extensive testimony regarding alleged adverse effects of EMFs from, among others, a self-described 'resident physicist'. Additionally, it allowed and considered other 'safety' issues from persons of no particular or established experience. Their comments amount to nothing more than unsubstantiated and speculative fears regarding the intended further development of this site. Such cannot validly form a basis for denial of the special permit."

Matter of WEOK Broadcasting Corporation v. Planning Board of the Town of Lloyd, 79 N.Y.2d 373, 583 N.Y.S.2d 170 (1992). In this case, the petitioner made application for site plan approval for a radio transmitter facility. After review of the application pursuant to SEQRA, the Planning Board held that the environmental effects of the proposal could not be adequately minimized by practical mitigation measures. The Supreme Court of the County of Ulster annulled the Planning Board's determination and the Appellate Division, Third Department, affirmed. In this decision, the Court of Appeals affirmed, thereby annulling the Planning Board's findings.

The facility proposed would consist of 5 towers to be erected on a site in a business zone in which radio towers are designated as a permitted use. As part of the Planning Board's SEQRA determination, it requested that the petitioner address the towers' visual impact from 9 locations including FDR's residence, a national historic landmark. The petitioner's analysis, conducted by expert landscape architects, concluded that the towers would have minor impact from 6 locations, moderate impact from 1 location, and no impact from 2 locations, including FDR's residence. An independent consultant retained by the Board by and large supported petitioner's expert's conclusion but cautioned that visual assessment is by its nature subjective. In petitioner's final environmental impact statement, petitioner offered to reduce the height of the tallest of the 5 towers from 445' to 245' in order to further diminish the aesthetic impact.

In denying the application, the Planning Board held that the towers might be visible from the FDR residence and that the project would be of no benefit to the Town. The Court of Appeals' decision is especially noteworthy for its holding that by including radio towers as a permitted use in the zone in question, it must be presumed that the Town had considered the aesthetic visual impact of towers in the district. While holding that negative aesthetic impact factors may constitute a sufficient basis upon which a SEQRA determination may be made, the Court held "Negative aesthetic impact consideration, alone, however, unsupported by substantial evidence, may not serve as a basis for denying approval of a proposed 'action' pursuant to SEQRA review".

The Court also noted that during the hearing, the petitioner offered expert testimony with respect to the aesthetic issue but that the Town and resident opponents did not do so and stated: "To permit SEQRA determinations to be based on no more than generalized, speculative comments and opinions of local residents and other agencies, would authorize agencies conducting SEQRA reviews to exercise unbridled discretion in making their determinations..."

Cellular Telephone Company v. Smith, (Supreme Court, Westchester County, Index Number 93-19138, 1/13/95). This Article 78 proceeding is related to the Article 78 proceeding hereinbefore discussed, Matter of Hertz. In this action, a petition was brought by Cellular One seeking an order vacating the Village of Mount Kisco Zoning Board of Appeals' denial of Cellular One's application for a modification of conditions imposed in a previously granted area variance. In 1988, an area variance was granted permitting Cellular One to erect an 85 foot pole with 2 12 foot antennas. In 1993, Cellular One presented evidence that the 2 existing omni antennas were interfering with neighboring cell sites and that, in order to reduce interference and to increase capacity, it was necessary to replace the 2 existing omni antennas with 9 new antennas of differing configurations. The Board of Appeals denied Cellular One's application, and an Article 78 petition was brought. The Court granted Cellular One's petition stating: "This Court views the holding of Matter of Consolidated Edison...as confirmed in Matter of Cellular Telephone Company v. Rosenberg...to require an equivalent relaxed application of the standard for area variances...when the applicant for such variance is a public utility." The Court acknowledged that if granted, the modification of conditions would have a visual impact, but recognized that an area variance may not be denied for aesthetic reasons alone. The decision is also noteworthy for the Court's rejection of any inference that the proposed modification would have a negative impact on the health of the community, citing language in Cellular Telephone Company v. Rosenberg to the effect that cellular transmissions do not effect "humans, animals, or any other organisms". Finally, the Court recognized that when weighing the benefit to the community against the detriment, it must be recognized that improved cellular telephone communications are of a benefit not only to the residents of the municipality in question, but to customers throughout the metropolitan area, stating, "in the face of the demonstrated need for the utility facility in the locality, the zoning provisions may not be so provincially applied."

Cellular Telephone Company v. Village of Tarrytown, ___ A.D.2d ___, ___ N.Y.S.2d ___ (2d Dep't 1994). In this action, Cellular One brought an application for a variance to erect 9 antennas on an existing building to alleviate a reception gap. After a public

hearing, the Village Board of Appeals directed the Village Attorney to prepare documents necessary for the issuance of a variance. However, the Village Board of Trustees passed a moratorium on the installation of cellular telephone antennas. Cellular One brought an action in Supreme Court, Westchester County, seeking an order declaring the moratorium null and void. The Court granted Cellular One's application. The Village then adopted a second moratorium. Cellular One brought a second action seeking an order declaring the second moratorium null and void and seeking a preliminary injunction pending the determination. The Court granted Cellular One's application and declared the moratorium null and void. In so ruling, the Court held that the moratorium prevented Cellular One from performing a mandated service, noting that a village cannot override a federal mandate by enacting a moratorium passed solely on a perception of risk. The Court noted that Cellular One had presented unequivocal, unrefuted studies showing that cellular antennas pose no health risk. The Village appealed. The Appellate Division, Second Department, reversed trial term's order, holding that the Court below had erred in adjudicating the rights of the parties beyond the preliminary injunction stating that no notice had been given that Cellular One's application for a preliminary injunction would be treated as one for a permanent injunction. In essence, the Court held that the action was not ripe for a final determination. However, the Appellate Division did grant a preliminary injunction permitting Cellular One to take such action as necessary to erect the antennas short of "actually installing the cells." The Appellate Division recognized that Cellular One was entitled to the preliminary injunction inasmuch as Cellular One had shown the likelihood of success on the merits of its application, that it would suffer injury if the injunction were not to be granted, and that the equities lie in its favor.

HADEL v. MINEO, (Supreme Court, Nassau County, Index Number 33724/93, 1/18/94). In this matter, petitioner is an amateur radio operator who made application for a height variance to maintain an amateur radio tower of 56 feet in height which is 26 feet in excess of the permitted height in his district. Petitioner contended that he needed a tower of that height to operate his radio pursuant to his FCC license. Petitioner's application was denied by the Town of Hempstead Zoning Board of Appeals which held that to permit petitioner to maintain a ham radio tower of 56 feet would have a devastating effect on nearby residents due to interference. The Board found that the applicant could lawfully and reasonably operate at 30 feet. An Article 78 proceeding was brought by the petitioner challenging the decision. The Court considered the question whether licenses and regulations of the FCC preempt local regulation of amateur radio operations and cited a decision rendered by the FCC known as "PRB-1" in which the FCC held "local regulations which involve...height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur federal preemption of state and local

regulations pertaining to amateur radio facility, PRB-1." The Court concluded that there was no proof in the record to support the conclusion that petitioner could reasonably operate with a 30 foot tower and did not consider the adverse effects of a 30 foot tower as opposed to a 56 foot tower. Accordingly, the decision of the Zoning Board of Appeals was annulled and the matter was remanded to the Zoning Board of Appeals for further findings consistent with the Court's decision. We are advised the Zoning Board of Appeals heard this matter on remand on January 25, 1995 and reserved decision.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 1995, I caused copies of the foregoing "Comments of McCaw Cellular Communications, Inc. In Support of Petition for Rule Making" to be delivered by messenger to the following:

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